

ANALYSIS OF ORIGINAL BILL

Franchise Tax Board

Author: Bowen Analyst: Kristina E. North Bill Number: SB 1841
Related Bills: See Legislative History Telephone: 845-6978 Introduced Date: February 20, 2004
Attorney: Patrick Kusiak Sponsor: _____

SUBJECT: Electronic Monitoring Of Employees

SUMMARY

This bill would allow employers to engage in electronic monitoring of employees after providing notice to the employees.

PURPOSE OF THE BILL

According to the author's office, the purpose of this bill is to give employees notice of an employer's intent to electronically monitor them.

EFFECTIVE/OPERATIVE DATE

This bill would become effective January 1, 2005.

POSITION

Pending.

ANALYSIS

FEDERAL/STATE LAW

Under the federal Electronic Communications Privacy Act, current **federal law** provides protection against interception of electronic communications. However, it is not unlawful to intercept communications where one of the parties has given prior consent.

Current **state law** provides that the appointing powers shall determine, with approval from the department, those activities that are inconsistent, incompatible, or in conflict with a state officer or employee's duties. These activities include and are not limited to using state time, facilities, equipment, or supplies for private gain or advantage, and not devoting his or her full time, attention, and efforts to his or her state office or employment during his or her hours of duty as a state officer or employee.

Current **state law** prohibits a state officer or employee from engaging in any employment, activity, or enterprise that is clearly inconsistent, incompatible, in conflict with, or inimical to his or her duties as a state officer or employee. State law also requires state agencies to adopt rules governing the application of these laws and to notify state officers and employees upon their employment of the existence of these laws and their application to employees.

Board Position:

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Department Director

Date

Gerald H. Goldberg

4/21/2004

Current **state law** requires a state agency to notify a California resident if their personal information has been acquired by an unauthorized person due to a breach of security in that agency's computer system.

Current **state tax law** requires Franchise Tax Board (FTB) to notify a taxpayer of any unauthorized inspection or unwarranted disclosure or use of his or her confidential taxpayer information if criminal charges are filed. Unauthorized inspection could include seeing or overhearing confidential taxpayer information.

Current **state law** prohibits an employer from recording, video or audio, an employee in a restroom, locker room, or room designated by an employer for changing clothes without a court order.

Current **state law** makes employers potentially liable if an employer's agents or employees use the employer's computers for improper purposes, such as sexual harassment or defamation.

THIS BILL

This bill would require employers to notify employees when they electronically monitor the employees. However, an employer would be allowed to electronically monitor an employee without prior notice when the employer has reasonable grounds to believe that: 1) a particular employee is behaving in a manner that would violate the legal rights of or injure the employer or another person, and 2) the electronic monitoring will produce evidence of the employee's behavior and will be conducted in accordance with other laws.

This bill would hold an employer liable for intentionally engaging in electronic monitoring of an employee without first providing notice to the employee, except in the above-described circumstances. Placing signs in the workplace would not constitute adequate notice to an employee. An employee would be allowed to file a civil action and request damages of not less than \$5,000, plus punitive damages, reasonable attorney's fees, and other reasonably incurred costs relating to the litigation.

An employer would be required to provide annual notice of electronic monitoring to an employee beginning within one year of the original notice. The notice would be required to describe:

- ◆ What form of communication (including audio, video, and wire) or type of computer usage would be monitored,
- ◆ The means of carrying out the monitoring,
- ◆ The kinds of information that would be obtained through the monitoring,
- ◆ The frequency of the monitoring, and
- ◆ The manner in which the information will be stored, used, or disclosed.

Additionally, this bill would require an employer to give notice of any material change in an electronic monitoring practice.

This bill would specify that employee rights provided in this bill could not be waived by contract or otherwise unless the waiver is part of a written settlement to a pending action or complaint. This bill would define:

- ◆ “Electronic monitoring” as the collection of data regarding an employee’s behavior or communications, including the use of a computer, telephone, wire, radio, camera, or electromagnetic, photo-electronic, or photo-optical or any other means besides direct observation.
- ◆ “Employee” as a person performing services under an express or implied contract for an employer for wages or a salary.
- ◆ “Employer” as a person, partnership, corporation, or other individual or organization obtaining the services of an employee in exchange for financial remuneration.

This bill would not preempt, modify, or amend any county or local law, ordinance, or regulations that provides greater protection to employees.

A person violating these provisions would be guilty of a misdemeanor.

IMPLEMENTATION CONSIDERATIONS

FTB is charged with collecting, maintaining, and protecting the privacy of taxpayer information. As such, FTB engages in extensive electronic monitoring of employee activities. FTB has established a notification practice that includes: 1) an annual confidentiality statement, 2) a security pamphlet, 3) an electronic security banner that is presented prior to any individual gaining network or system access, and 4) annual computer-based security training. If FTB is required to specifically identify the means, manner, and frequency of its electronic monitoring and the storage, use, and disclosure of the results, the systems and procedures to protect the privacy of taxpayer information and cashing of receipt could be compromised. For example, by providing the notice information required by this bill, employees could evade detection of unauthorized access to taxpayer information or theft of taxpayer checks. Additionally, an employee, or any other individual provided with such information, could use the monitoring information potentially to design and launch a successful and undetected system attack. The author may wish to consider providing an amendment that provides that it is not the intent of the bill to prevent a public agency from performing its statutorily mandated mission, such as protecting confidential taxpayer information.

The term “material change” in an electronic monitoring practice is subject to multiple interpretations, which may lead to disputes between employees and employers. Clarification of the author’s intent about this provision may help in administering this provision of the bill.

LEGISLATIVE HISTORY

SB 1016 (Bowen, 1999/2000) and **SB 1822** (Bowen, 1999/2000) would have required employers to execute signed or electronically verifiable agreements between employer and employees giving the right of the employer to monitor the e-mail traffic and computer files of employees. Governor Gray Davis vetoed **SB 1016** on October 10, 1999, and **SB 1822** on September 30, 2000, because each bill would have placed undue regulatory burdens and could have legally exposed large and small businesses “for doing what any employee should assume is the employer’s right when they accept employment.”

OTHER STATES' INFORMATION

The states surveyed include *Florida, Illinois, Massachusetts, Michigan, Minnesota, and New York*. These states do not provide a comparable requirement as proposed by this bill. These states were selected due to their similarities to California's economy, business entity types, and tax laws.

FISCAL IMPACT

The department's costs to administer this bill cannot be determined until implementation concerns have been resolved but are anticipated to be minor to moderate.

ECONOMIC IMPACT

Revenue Estimate

This bill would not impact the state's income tax revenue.

LEGISLATIVE STAFF CONTACT

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